Trengganu Forest Products Sdn Bhd v Cosco Container Lines & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5–22–412 OF 1997
RAMLI ALI J
3 MAY 2007

Civil Procedure — Time — Limitation of action — Whether action time barred — Whether Carriage of Goods by Sea Act 1980 (Act 527) and International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of Brussels 1924 applied — Carriage of Goods by Sea Act 1980 (Act 527) — International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of Brussels 1924

Civil Procedure — Striking out — Application to strike out action — Amended writ and statement of claim — Whether action time barred — Rules of the High Court 1980 O 18 r 19 — Carriage of Goods by Sea Act 1980 (Act 527) — International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of Brussels 1924

Civil Procedure — Appearance — Unconditional appearance — Effect of — Whether defendant precluded from filing application to strike out

Statutory Interpretation — Construction of statutes — Applicability — Intention of statute — Purpose of — Whether provisions to be given wide meaning — Plain and ordinary meaning

This was the plaintiff's claim against the defendants in respect of loss and damage suffered by the plaintiff as a result of the fraudulent misrepresentation in the bill of lading by the defendants which the plaintiff claimed to have breached the implied term of the contract of carriage. The first defendant applied to strike out the plaintiff's amended writ and statement of claim under O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1950 on the ground that the plaintiff's claim was time barred by the relevant applicable laws ie the Carriage of Goods by Sea Act 1980 (Act 527) ('COGSA') and the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of Brussels 1924 ('the Hague Rules 1924').

Held, allowing the first defendant's application with costs:

(1) The subject matter of the plaintiff's claim against the first defendant was a shipping matter which involved the issuance of a bill of lading and shipment from Malaysia. Therefore, the COGSA, which in turn gave effect to the Hague Rules 1924 must apply (see para 18).

(2) In the instant case, the cargo arrived and was stored in Xingang Port, China on 27 May 1994 and the goods were discharged at the disposal of the buyer. The first defendant had done their part in ensuring that the goods were delivered and discharged at the disposal of the buyer. So, for the purpose of the time bar provisions under art III r 6, the date when the goods were delivered or the date when the goods should have been delivered was 27 May 1994. The fact that the buyer had rescinded the contract and rejected the goods does not in any way change the status of delivery of the goods for the purpose of art III r 6 provisions. Therefore, any action, claim or suit in respect of loss or damage against the first defendant must be brought or filed within one year after 27 May 1994. The present suit was only instituted in Malaysia against the first defendant on 28 July 1997, some three years later. The suit was filed beyond the limitation period of one 1 year after 17 May 1994 (see paras 28–29).

(3) The words 'loss or damage' in the limitation provisions under art III r 6 extend to loss or damage which is related to the goods. They do not refer only to physical loss or damage to the goods. The provisions in art III r 6 must be given a wider construction of 'loss or damage' because it is fully consistent both with the purpose of the limitation provisions itself and with the broader purpose of the Hague Rules as a whole (see para 30).

(4) In the present case, the particulars of 'loss or damage' as claimed by the plaintiff against the first defendant in their amended statement of claim clearly fell within the definition of 'loss or damage' ie loss or damage which was related to the goods in question (see para 32).

(5) It is important to give the phrase 'all liability' its plain and ordinary meaning. The phrase 'all liability' is crystal clear in that it discharges the first defendant from each and every liability in respect of goods carried under a contract of carriage if a claim is not brought by the plaintiff within 12 months. Hence, that simple and usual meaning of that phrase should be applied to extinguish all claims, including that for the tort of deceit brought by the plaintiff against the first defendant because the suit was not filed within the required one year period stipulated in art III r 6 of the Hague Rules 1924 (see para 36, 45).

(6) On the issue of unconditional appearance, there is nothing in O 18 r 19 of the Rules of the High Court 1980 stating that to strike out the writ and statement of claim a conditional appearance must be filed first or that once an unconditional appearance has been filed, an interested party is precluded from making on application of striking out on the given grounds. In other words, the filing of a conditional appearance is not a pre-requisite for the filing of an O 18 r 19 application (see para 53).

[Bahasa Malaysia summary

Ini merupakan tuntutan plaintif terhadap defendan-defendan berkaitan kerugian dan kerosakan yang dialami oleh plaintif akibat daripada salah nyata secara fraud dalam bil muatan kapal oleh defendan-defendan yang mana plaintif mendakwa telah melanggar terma tersirat kontrak pengangkutan. Defendan pertama telah memohon

untuk membatalkan pindaan writ dan penyataan tuntutan plaintif di bawah A 18 k 19(1)(b), (c) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan bahawa tuntutan plaintif telah luput had masa oleh sebab undang-undang yang terpakai berkaitan iaitu Akta Pengangkutan Barang Melalui Laut 1950 (Akta 527) ('APBML') dan International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of Brussels 1924 ('Hague Rules 1924').

Diputuskan, membenarkan permohonan defendan pertama dengan kos:

(1) Perkara utama dalam tuntutan plaintif terhadap defendan pertama adalah suatu perkara perkapalan yang melibatkan pengeluaran bil muatan kapal dan penghantaran daripada Malaysia. Oleh itu, APBML, yang memberi kesan kepada Hague Rules 1924 patut terpakai (lihat perenggan 18).

(2) Dalam kes ini, kargo tiba dan ditempatkan di Pelabuhan Xingang, China pada 27 Mei 1994 dan barangan telah dilepaskan untuk penjualan pembeli. Defendan pertama telah melaksanakan bahagian mereka dalam memastikan barangan tersebut dihantar dan dilepaskan untuk penjualan pembeli. Oleh itu, bagi tujuan peruntukan had masa di bawah art III k 6, tarikh semasa barangan tersebut dihantar atau tarikh apabila barangan tersebut patut dihantar adalah pada 27 Mei 1994. Fakta bahawa pembeli telah membatalkan kontrak tersebut dan menolak barangan tersebut tidak sekalipun menukar status penghantaran barangan tersebut bagi tujuan peruntukan-peruntukan art III k 6. Guaman ini hanya dimulakan di Malaysia terhadap defendan pertama pada 28 Julai 1997, lebih kurang tiga tahun kemudian. Guaman tersebut telah difailkan selepas tempoh had masa satu tahun selepas 17 Mei 1994 (lihat perenggan 28–29).

(3) Perkataan 'loss or damage' dalam peruntukan had masa di bawah art III k 6 merangkumi kerugian dan kerosakan yang berkaitan dengan barangan. Ia bukan hanya kerugian fisikal atau kerosakan kepada barangan. Peruntukan-peruntukan art III k 6 patut diberikan tafsiran yang meluas terhadap 'loss or damage' kerana ia konsisten bagi tujuan peruntukan had masa itu sendiri dan tujuan meluas Hague Rules secara keseluruhannya (lihat perenggan 30).

(4) Dalam kes ini, butir-butir yang 'loss or damage' seperti dituntut oleh plaintif terhadap defendan pertama dalam penyataan tuntuan pindaan mereka jelas terangkum dalam definisi 'loss or damafe' iaitu kerugian atau kerosakan yang berkaitan dengan barangan yang dipersoalkan (lihat perenggan 32).

(5) Adalah penting untuk memberikan istilah 'all liability' maksud jelas dan biasanya. Istilah 'all liability' dengan nyata melepaskan defendan pertama daripada setiap dan semua liabiliti berkaitan barangan yang dibawa di bawah suatu kontrak pengangkutan jika suatu tuntutan tidak dimulakan oleh plaintif dalam tempoh 12 bulan. Oleh demikian, maksud mudah dan biasa istilah itu patut terpakai untuk melenyapkan semua tuntutan, termasuklah untuk tort penipuan yang dilakukan oleh plaintif terhadap defendan pertama kerana guaman tersebut tidak difailkan dalam tempoh satu tahun yang ditetapkan dalam art III k Hague Rules 1924 (lihat perenggan 36, 45).

(6) Berhubung isu kehadiran tidak bersyarat, tiada apa dalam A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 yang menyatakan bahawa untuk membatalkan writ dan penyataan tuntutan satu kehadiran bersyarat hendaklah difailkan terlebih dahuku ataupun setelah satu kehadiran tidak bersyarat telah difailkan, pihak berkepentingan dikecualikan daripada membuat satu permohonan pembatalan berdasarkan alasan-alasan yang diberikan. Dalam erti kata lain, pemfailan kehadiran bersyarat bukan satu pra syarat untuk pemfailan satu permohonan A 18 k 19 (lihat perenggan 53).]

Notes

For cases on applicability of statutes, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1842–1849.

For cases on limitation of action, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7784–7788.

For cases on application to strike out action, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6696–6702.

For cases on unconditional appearance, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1573–1582.

Cases referred to

Anglo Irish Beef Processors International v Federated Stevedoves Geelong & Ors [1997] 1 Lloyd's Rep 207 (refd)

Aries, The [1977] 1 Lloyd's Rep 334 (refd)

Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman [1987] 2 MLJ 633 (refd)

Beltano, The [1967] 1 Lloyds Rep 531 (refd)

Captain Gregos, The [1990] 1 Lloyd's Rep 310 (refd)

Cargill International SA v CPN Tankers (Bermuda) Ltd 'The Ot Sonja' [1993] 2 Lloyds Rep 435 (refd)

Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases [1983] 2 MLJ 227 (refd)

Jhi Jiang Kou, The [1991] 1 Lloyd's Rep 493 (refd)

Kapetan Markos NL, The [1986] 1 Lloyd's Rep 211 (refd)

Leong Peng Kheong & Anor v Dawntree Properties Sdn. Bhd [2002] 2 MLJ 186 (refd)

Merak, The [1964] 2 Lloyd's Rep 5127 (refd)

N Carrupaiya v MBF Property Services Sdn Bhd & Anor [2000] 4 MLJ 389 (refd)

New York Star, The [1980] 2 Lloyd's Rep 317 (refd)

Norwest Holdings Sdn Bhd v Muhibbah Engineering (M) Bhd [2004] 4 MLJ 481 (refd)

Pioneer, The [1995] 1 Lloyd's Rep 223 (refd)

Pyrene Co Ltd v Scindia Navigation Co [1954] 2 QB 402 (refd)

Riches v Director of Public Prosecutions [1973] 2 All ER 935 (refd)

Stag Line Ltd v Foscolo, Mango & C Ltd [1932] AC 328 (refd)

Stage Line Ltd v Foscolo Mango & Co Ltd [1931] All ER Rep 666 (refd)

Tang Woung Shiu v Kun Yeung & Anor [2003] 1 HKC 195 (refd)

Tapematic Spa v Wirana Pte Ltd & Anor [2002] 4 SLR 953 (refd)
Tengku Ali Ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83 (refd)

Legislation referred to

Carriage of Goods by Sea Act 1924
Carriage of Goods by Sea Act 1950 art III r 6 First Schedule s 2
International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of Brussels 1924 [UK]
Limitation Act 1939 [UK]
Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 of Sabah
Merchant Shipping (Implementation of Conventions Relating to the Carriage of Goods by Sea and to Liability of Ship Owners And Others) Regulations 1960 of Sarawak
Rules of the High Court 1980 O 18 r 19(1)(b), (c), (d)

R Thormy (Shook Lin & Bok) for the plaintiff.
J Joseph (Joseph & Partners) for the first defendant.

Ramly Ali J:

[1] These grounds of judgment are in respect of the first defendant's application to strike out the plaintiff's amended writ and statement of claim dated 28 February 1998 against the first defendant under O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ('RHC').

[2] The plaintiff's claim against the defendants is in respect of loss and damage suffered by the plaintiff as a result of the fraudulent misrepresentation in the bill of lading by the defendants which the plaintiff claimed to have breached the implied term of the contract of carriage.

FACTUAL BACKGROUND

[3] The plaintiff is a company incorporated under the laws of Malaysia and carries on at all material times, the business of local and international timber trading at 6th Mile, Kuala Kangsar Road, 30010 Ipoh, Perak.

[4] The first defendant is a company incorporated in the People's Republic of China and engages in the business of shipping containers. The first defendant has a address for service at Bock A, Lucky Tower, 3 Dongsanhuan Bei Road, Chaoyang District, Beijing 100027, People's Republic of China.

[5] The 2nd Defendant is a company incorporated in Malaysia with its place of business at 3rd Floor, Room 301, Southern Bank Building, 21 Beach Street, 10300 Penang, Malaysia.

[6] By a contract No. 94HBM-002 and dated 4 March 1994, the plaintiff agreed to sell 56 containers of plywood ('the said cargo') to Hebei Metals & Minerals Import and Export Corporation ('the buyer').

[7] terms of the contract of sale expressly stipulated that:

(i) the shipment must be made before 30 April 1994;

(ii) the said cargo be loaded at a Malaysian Port;

(iii) the said cargo be discharged at Xingang Port, China; and

(iv) payment be made by way of irrevocable letter of credit.

[8] In performing its obligations under the contract of sale, the plaintiff entered into a contract of carriage with the defendants, who were at all material times, engaged as the carrier for the said cargo. The contract of carriage is evidenced by a Bill of Lading No PKXG-4018. The defendants issued and/or represented the said Bill of Lading as 'shipped on board' on 30 April 1994 aboard the vessel 'Tuo He V.103' at Port Klang.

[9] In reliance of the said representations on the Bill of Lading and acting on good faith, the plaintiff submitted the documents including the bill of lading dated 30 April 1994 to the negotiating bank for due payment pursuant to the letter of credit.

[10] The said cargo arrived in Xingang, China on 27 May 1994 and on 7 June 1994, the said cargo was compounded by the Chinese court by reason of the Buyer rescinding the contract of sale and rejecting the said cargo. The Buyer had also obtained an injunction to stop one Bank of China, Changsha from releasing funds pursuant to the letter of credit.

[11] In the arbitration between the buyer and the plaintiff before the China International Economic and Trade Arbitration Commission, Beijing ('CIETAC'), CIETAC decided against the plaintiff.

[12] An Award was then made against the plaintiff in which the plaintiff is to pay the buyer the total sum of approximately US152,730 (including interest up to 20 September 1996) and RM187,821 (including the buyer's share of the arbitration fees and the plaintiff's legal fees and expenses). The plaintiff paid the compensation to the Buyer accordingly on or about 11 October 1996.

[13] By reason of the matters aforesaid, the plaintiff has suffered loss and damage.

FIRST DEFENDANT'S APPLICATION

[14] Enclosure 66, is the first defendant's application to strike out the plaintiff's Amended writ and statement of claim under O 18 r 19(1)(b), (c) and (d) of the RHC on the ground that the plaintiff's claim is time barred by the relevant applicable laws

ie the Carriage of Goods by Sea Act 1950 (Act 527) ('COGSA') and the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of Brussels 1924 ('the Hague Rule 1924').

THE PLAINTIFF'S ARGUMENTS

[15] In opposing the first defendant's application, the plaintiff argues that their claim against the first defendant is in respect of the loss and damage suffered by the plaintiff as a result of fraudulent misrepresentation in the bills of lading by the first defendant and therefore the plaintiff states that the Hague Rules 1924 and the COGSA is not applicable. In this respect, the plaintiff states that the Hague Rules is not applicable because art III r 6 of the First Schedule of Carriage of Goods by Sea Act 1950 is only relates to contractual liabilities in relation to the loading, handling, stowage, carriage custody, care and discharge of the goods and does not extend to tortuous liabilities arising under the bill of lading.

[16] On the above arguments, the plaintiff submits that the plaintiff's claim against the defendants is not time barred as claimed by the first defendant and prays that the first defendant's application to strike out the plaintiff's amended writ and statement of claim must fail and be dismissed with costs.

ISSUES TO BE DETERMINED BY COURT

[17] Issues to be determined by the court in the present application are as follows:

(a) whether the plaintiff's claim against the first defendant falls under the purview of the Hague Rules and the COGSA;

(b) whether the plaintiff's claim against the first defendant is time barred; and

(c) whether the plaintiff's claim against the first defendant can be struck out on the ground of being time barred.

FINDINGS OF COURT

[18] The subject matter of the plaintiff's claim against the first defendant is a shipping matter which involves on issuance of Bill of Lading and shipment from Malaysia. Therefore, the Court is of the view that the COGSA, which in turn gives effect to the Hague Rules 1924 must apply.

[19] Section 2 of the COGSA clearly provides:

> Subject to this Act, the Rules set out in the First Schedule shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Malaysia to any other port whether in or outside Malaysia.

[20] The Rules referred to in this s 2, relate to 'Rules Relating to Bills of Lading' as provided under the First Schedule of the COGSA. These Rules were made by the International Conference on Maritime Law held at Brussels October 1922 and

amended at a meeting held at Brussels in October 1923. They were first adopted and applied in the former Federated Malay States, Johore and the Straits Settlements and subsequently extended to apply throughout the Federation (see Explanatory Foot Notes to s 2 of the COGSA. (Act 527).

[21] The COGSA gives force to the Hague Rules and provides for it's compulsory application to bills of lading and similar documents of title issued in relation to outward bound cargoes. The method of enactment adopted is the method of attaching the international convention in a schedule to the Act. The COGSA was modeled after the UK Carriage of Goods by Sea Act 1924.

[22] The Hague Rules as enacted by the COGSA compulsorily apply in four ways — ie they only apply to outward-bound journey (s 2); to contract of carriage covered by Bills of Lading and similar documents of title (s 4, art 1(b) of the Rules); to carriage of goods other than live animals and cargo carried on deck (art 1(c); and the period from the time when the goods were loaded on to the time when they are discharged from the ship (art 1(e) (see *Pyrene Co Ltd v Scindia Navigation Co* [1954] 2 QB 402).

[23] The Rules are applied by the COGSA to only West Malaysia (s 1) but are also effective in Sabah and Sarawak by virtue of the Merchant Shipping (Implementation of Conventions Relating to the Carriage of Goods by Sea and to Liability of Ship Owners And Others) Regulations 1960 of Sarawak and the Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 of Sabah.

[24] In the present case, the plaintiff's claim against the first defendant clearly based on the bill of lading in connection with the carriage of goods (56 containers if plywood) by sea in ship from Port Klang (port in Malaysia) outward bound to Xingang in China. Therefore, the court is of the view that the relevant provisions of the COGSA and the Hague Rules 1924 are compulsorily applicable.

TIME BAR PROVISIONS UNDER ARTICLE III RULE 6 OF THE FIRST SCHEDULE, COGSA

[25] The relevant part relating to time-bar limitation under the COGSA is found in art III r 6 of the First Schedule, which inter alia provides:

> 'In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

[26] The said provision is clear that 'the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods (actual delivery) or the date when the goods should have been delivered.' Any suit brought after the one year period is time barred by virtue of the provision.

[27] It has been held that delivery for the purpose of the Hague Rules can take place when the goods are put at the disposal of the buyer ie when the Buyer has the opportunity to take possession of the cargo and not necessarily when the buyer has actual possession. (see *The Beltano* [1967] 1 Lloyds Rep 531 — Sup Ct WA).

[28] In the instant, the cargo arrived and stored in Xingang Port, China on 27 May 1994 and the goods were discharged at the disposal of the Buyer. The first defendant has done their part in ensuring that the goods were delivered and discharged at the disposal of the Buyer. So, for the purpose of the time-bar provisions under art III r 6, the date when the goods were delivered or the date when the goods should have been delivered, is 27 May 1994. The fact that the Buyer had rescinded the contract and rejected the goods does not in any way change the status of delivery of the goods for the purpose of art III r 6 provisions. Therefore, any action, claim or suit in respect of loss or damage against the first defendant (as the carrier) must be brought or filed within one year after 27.5.1994.

[29] The present suit was only instituted in Malaysia against the first defendant on 28 July 1997, some three years later. This clearly shows that the suit was filed beyond the limitation period of one year after 17 May 1994.

[30] The words 'loss or damage' in the limitation provisions under art III r 6 extend to loss or damage which is related to the goods. They do not refer only to physical loss or damage to the goods. The provisions in art III r 6 must be given a wider constructions on 'loss or damage' because it is fully consistent both with the purpose of the limitation provisions itself and with the broader purpose of the Hague Rules as a whole. In *Stage Line Ltd v Foscolo Mango & Co Ltd* [1931] All ER Rep 666, Lord Macmillan (at p 677) commented on the UK COGSA 1924 (equivalent to our Malaysia COGSA 1950) as follows:

> It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the schedule have an international currency. As these rules must come under the consideration of the foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.

[31] Again, in *Cargill International SA v CPN Tankers (Bermuda) Ltd 'The Ot Sonja'* [1993] 2 Lloyds Rep 435, the Court of Appeal (UK) held that the meaning of 'loss and damage' in the limitation provisions should be harmonised with the established meaning of those words in s 4 where it was held that 'loss or damage' did not only relate to physical damage of the goods but had a wider meaning; the words 'loss or damage' in the limitation provisions extend to loss or damage which was related to the goods.

[32] In the present case, the particulars of 'loss or damages' as claimed by the plaintiff against the first defendant in their amended statement of claim clearly fall within the definition of 'loss or damage' as established in the above authorities cited

ie loss or damage which is related to the goods in question. It includes the total value of the goods as well as compensation paid to the buyer and arbitration and legal fees related to the goods.

[33] The word 'suit' in art III r 6 has been widely interpreted by the judiciary. It has been construed widely to include not only an action brought before the Court but also covered proceedings by arbitration. This liberal view of the word 'suit' is reflected in *The Merak* [1964] 2 Lloyd's Rep 5127 (CA), where Lord Justice Selles said the following:

> I can see no good reason for giving the word 'suit' in this context the limited meaning which has been advanced. The Hague Rules (sic) are of international application, arbitration has long been a method of settling disputes agreed by parties to contracts for carriage by sea, and whilst it was agreed that there should be a period of limitation there is nothing to indicate that a step in an arbitration would not be as effective as a writ in an action unless 'suit' can only have the meaning in our courts of an action. I do not find any authority which requires us so to hold.

[34] The word 'suit' has been broadly used to cover not only a suit based on a breach of contract of carriage, but also one founded in tort. This was expressed by Justice Brooking in *Anglo Irish Beef Processors International v Federated Stevedoves Geelong & Ors* [1997] 1 Lloyd's Rep 207 at p 213 (Australia Supreme Court of Victoria, Court of Appeal) who said that:

> … when art III rule 6 speaks of 'suit' being brought within one year, it comprehends not only action in contract, but also an action in tort.

[35] The relevant art III r 6 is drafted in general and all-embracing terms: 'In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage …'. The plaintiff in the present case, argues that the plaintiff's claim against the first defendant is based on tort of deceit and therefore falls outside the ambit of the time bar limitation under art III r 6. The plaintiff further argues that the claim is subject to time limit of six years under the Limitation Act 1939, but not under art III r 6 of the Hague Rules.

[36] The court cannot agree with the plaintiff's argument on this issue. The court is of the view that it is important to give the phrase 'all liability' its plain and ordinary meaning. The phrase 'all liability' is crystal clear in that it discharges the carrier from each and every liability in respect of goods carried under a contract of carriage if a claim is not brought by the plaintiff within 12 months.

[37] This all encompassing interpretation of 'all liability' is also supported by Lord Wilberforce in *The New York Star* [1980] 2 Lloyd's Rep 317 who expressed the following view:

> A further point made was that clause 17 applied at most to actions for breach of contract; the stevedore's negligence as bailee, however, gave rise to an action in tort which was not governed by the time bar. Their Lordships' opinion on these arguments is clear. However adroitly presented, they are unsound, and indeed unreal. Clause 17 is drafted in

general and all-embracing terms: 'In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought unto; jurisdiction shall have been obtained over the Carrier and/or the ship by service of process of by an agreement to appear'. The reference to delivery of the goods shows clearly that the clause is directed towards the carrier's obligations as bailee of the goods. It cannot be supposed that it admits of a distinction between obligations in contract and liability in tort; 'all liability's means what it says.

[38] From the judgment above, it is apparent that cl 17 which is similar in drafting to art III r 6 of the Hague Rules, is wide enough to cover all liability in tort. As long as the defendant carrier has carried the goods and made delivery, any liability arising out of that process will fall within the phrase 'all liability'. The New York Star was also followed in *The Captain Gregos* [1990] 1 Lloyd's Rep 310 (CA), where Lord Justice Bingham expressed the view that 'all liability' in art III r 6 meant there is nothing to suggest that a distinction must be made between obligations in contract and liability in tort.

[39] 'All liability' is the plain and ordinary phrase used in drafting art III r 6. At this juncture, it is important to remember that Lord Atkin cautioned in *Stag Line Ltd v Foscolo, Mango & C Ltd* [1932] AC 328 at pp 342–343 that:

... the Rules will often have to be interpreted in the courts of the foreign consignees. For the purpose of uniformity it is, therefore, important that the Courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

[40] The widely drafted phrase 'all liability' has also meant as being held by the Australia Supreme Court of New South Wales in *The Jhi Jiang Kou* [1991] 1 Lloyd's Rep 493 that even claims for misdelivery of goods carried by sea which gives rise to the tort of conversion must be subjected to art III r 6 of the Hague Rules.

[41] Hence, even if the plaintiff had filed a claim for a tort of deceit, it would still have to be subjected to the one year limitation period. Therefore, even if the plaintiff has a claim against the first defendant for backdating the bill of lading, that claim would be time barred under art III r 6 as the plaintiff did not file the claim within one year after the delivery of the goods or the date when the goods should have been delivered on 27 May 1994.

[42] The purpose of the limitation provisions under art III r 6 is to provide finality to all claims against the carrier or ship. In *The Pioneer* [1995] 1 Lloyd's Rep 223, Justice Phillips emphatically declared that 'the object of the Hague Rules time limit is to protect ship owners from stale claims'. In fact the effect of the limitation is by extinguishing both the claim as well as the remedy if the action is time-barred under art III r 6. This is indeed different from other limitation of time provisions which

only bar the remedy, but not the substantive claim itself. There is a difference between a procedural time bar which extinguishes the remedy and a substantive time bar which extinguishes the claim as well.

[43] In *The Nordglimt*, Hobhouse J at p 190, put it clearly as follows:

> There can be little doubt that the reasoning of Roskill J involved accepting that Article III rule 6, had essentially a procedural character, He expressly based his decision upon authorities on the Limitation Acts 1939. The proceedings before the court must have been brought in time otherwise they must fail. However, as was held in *Aries Tanker Corp v Total Transport Ltd* [1977] 1 WLR 185, the discharge given by art III r 6 is substantive not procedural.
>
> … But I do not think that sufficient recognition has been given by the courts below, it is a time bar of a special kind viz one which extinguishes the claim not one which, as most English statutes of limitation and some international convention do, bars the remedy while leaving the claim itself in existence. Therefore, arguments to which much attention and refined discussion has been given, as to whether the charterer's claim is a defence, or in the nature of a cross-action, or a set off of one kind or another, however, relevant to cases to which the Limitation Act 1939 or similar Acts apply, appear to me, with all respect, to be misplaced. The charterers claim, after May 1974 and before the date of the writ, had not merely become unenforceable by action, it had simply ceased to exist.

[44] In *The Aries* [1977] 1 Lloyd's Rep 334, the House of Lords held that the discharge given by art III r 6 is substantive, not procedural; it discharges the carrier's liability and does not merely bar the cargo owner's remedy. Lord Wilberforce at p 336, explained that the time bar in art III r 6 did not serve merely to bar the remedy, but rather extinguished the cause of acting, discharging the carrier expressly from 'all liability' if suit was not brought within oneyear meaning that there could not be are suscitation of the action.

[45] Hence, that simple and usual meaning of that phrase should be applied by this court to extinguish all claims, including that for the tort of deceit brought by the plaintiff against the defendant because the suit was not file within the required one year period stipulated in art III r 6 of the Hague Rules.

[46] Article III, rule 6 was designed to regulate the relationship between a carrier and a cargo-owner when goods were carried under a contract of carriage of goods by sea. Hence, in order to raise the defence of time bar under art III r 6, Lord Justice Parker in *The Kapetan Markos NL* [1986] 1 Lloyd's Rep 211 (CA) has suggested that a shipowner merely has to establish the following:

> If therefore the shipowner wishes to rely on the rule 6 discharge from liability he must establish first that the goods were carried under a contract of carriage by sea, next that suit to establish liability under the rules in respect of loss of or damage to the goods carried under the contract has not been brought within a year.

[47] All the defendant has to do in order to raise the time bar defence in the present case is as follows:

First, prove that the goods were carried under a contract of carriage of goods by sea. This requirement is satisfied as the goods were shipped under a COSCO bill of lading No PKXG-4018 dated 30 April 1994 issued in Port Klang. Second, establish that the plaintiff's claim was not brought within twelve months. Clearly, the present suit was not brought within twelve months.

[48] Based on the above considerations, the court makes the following findings:

(a) that the plaintiff's claim against the first defendant falls under the purview of the Hague Rules and the COGSA; and

(b) that the plaintiff's claim against the first defendant is time- barred under art III r 6 of the Hague Rules and the COGSA.

[49] The next issue is whether the plaintiff's claim against the first defendant can be struck out on the ground of being time barred under art III r 6 of the Hague Rules.

[50] Order 18 r 19(1) of the RHC states as follows:

19 Striking out pleadings and indorsements (Order 18, rule 19):

(19) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

(19) it discloses no reasonable cause of action or defence, as the case may be; or

(19) it is scandalous, frivolous or vexatious; or

(19) it may prejudice, embarrass or delay the fair trial of the action; or

(19) it otherwise an abuse of the process of the Court.

[51] The Federal Court in *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 applying the principles of striking out as stated in the Rules of the High Court held that the defence of limitation of time is a good ground to suggest that the writ and the statement of claim is scandalous, frivolous or vexatious, prejudice, embarrass or delay or an abuse of court process an ought to be struck out. Wan Sulaiman FJ applied a passage from Russel J in *Riches v Director of Public Prosecutions* [1973] 2 All ER 935, p 939 said:

In the light of those more recent authorities, I think, as I say, that perhaps the observations of this Court in *Dismore v Hilton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a Defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action, which has already been barred by statute of limitations and must fail.

[52] In the present case, the defence of limitation under the Hague Rules 1924 has been pleaded by the first defendant in the amended statement of defence. Therefore, the defence of time bar under the Hague Rules can be raised. The first defendant is relaying on their substantive right to rely on the time-bar provisions under the applicable statute. For the same reasons as in *Haji Hussin*, the court is of the view that the first defendant should not be called on to pay large sums of money and the plaintiff be permitted to waste large sums of his own or the first defendants money in an attempt to pursue a cause of action, which has already been barred by the limitation of time in the COGSA/Hague Rules.

[53] On the issue of unconditional appearance as raised by the plaintiff, the court is of the view that there is nothing in O 18 r 19 of the RHC, stating that to strike out the writ and statement of claim a conditional appearance must be filed first or that once an unconditional appearance has been filed, an interested party is precluded from making on application of striking out on the given grounds. In other words, the filing of a conditional appearance is not a prequisite for the filing of an O 18 r 19 application. The said O 18 r 19, certainly does not indicate anywhere the mandatory requirement that a striking out application must be undertaken within a specific time (see *Norwest Holdings Sdn Bhd v Muhibbah Engineering (M) Bhd* [2004] 4 MLJ 481; *N Carrupaiya v MBF Property Services Sdn Bhd & Anor* [2000] 4 MLJ 389; *Leong Peng Kheong & Anor v Dawntree Properties Sdn. Bhd* [2002] 2 MLJ 186; *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1987] 2 MLJ 633).

[54] Therefore, the plaintiff's argument that the first defendant is precluded writ and statement of claim under O 18 r 19 of the RHC on the ground that the first defendant had entered an unconditional appearance is clearly without merit and cannot be accepted by the court.

[55] The plaintiff also raises the issue of delay in filing the striking out application by the first defendant. The plaintiff relies on the case of *Tengku Ali Ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83. The case of Tengku Ali could be distinguished because in Tengku Ali the delay from the defence to the filing of the striking out application is five years. However, in the present case, the application to amend the defence was allowed by the court on 30 October 2006, wherein the plaintiff did not object to the application, and the striking out application was filed on 3 January 2007, hardly two months after the date of the amendment of the defence. There is no delay as asserted by the plaintiff.

[56] The first defendant's application to amend the defence was to plead the issue of limitation which the plaintiff did not object. The application was granted and two months later as a result of the amendment, the first defendant filed the present application to strike out the plaintiff's writ and statement of claim. Therefore, it would defy logic that the basis of the present application ie the amendment was not objected to, but the application to strike out is said to be a delayed application.

[57] The court can make an order to strike out any pleading or indorsement or anything in at any stage of the proceedings. Although striking out application must be made as soon as possible, the court will not refrain from striking out a statement

of claim even after commencement of trial. This is so because the court would otherwise waste its time and resources on a plea that is bound to fail (see *Tang Woung Shiu v Kun Yeung & Anor* [2003] 1 HKC 195).

[58] In *Tapematic Spa v Wirana Pte Ltd & Anor* [2002] 4 SLR 953 the court held that while an application to strike out a pleading should be made as soon as possible, a late application was not doomed to failure.

CONCLUSION

[59] Based on the above considerations the court rules that this is a proper case for the court to exercise its discretion to allow the first defendant's application to strike out the plaintiff's writ and statement of claim under O 18 r 19(1)(b), (c) and (d) of the RHC. Therefore, the first defendant's application is allowed with costs.

First defendant's application allowed with costs.

Reported by Brendan Navin Siva